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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 237

DOMINIC J. AVALLONE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Comes now Dominic J. Avallone, petitioner herein, by and through his undersigned attorneys, and respectfully prays this Honorable Court to issue a write of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 19th day of February, 1965, and the order of the same Court denying rehearing entered on the 12th day of May, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A. hereof and the advice to counsel as to the order denying rehearing is found in Appendix B. hereof.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37 (b) (1) (2) of the Federal Rules of Criminal Procedure. The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on the 19th day of February, 1965 (Appendix A.), and thereafter a petition for rehearing was timely filed (Appendix C.), and thereafter the said Court entered its order denying rehearing without opinion (Appendix B.).

QUESTION PRESENTED

I

Whether or not the trial court committed reversible error in denying appellant's motion for a mistrial after allowing the Government to ask prejudicial questions of the witness Cella after being informed by the Government that the said witness would invoke the Fifth Amendment and thereby attempting to prejudice the jury against the defendant.

STATUTES AND RULES INVOLVED

United States Constitution, Fifth Amendment; Title 26, United States Code, Section 4411; Title 26, United States Code, Section 4412; Title 26, United States Code, Section 4421 (1) (A); Title 26, United States Code, Section 4901 (a); Title 26, United States Code, Section 7203. Text of the same are set forth in Appendix H. hereof.

STATEMENT OF THE CASE

Your petitioner, Dominic J. Avallone, was accused in the information filed by the District Attorney for the Middle District of Florida #63-67-CR-J, alleging that

your petitioner was in the business of accepting wagers as defined by Section 4421 (1) (A), Title 26, United States Code, which charged the appellant with wilfully and knowingly failing to register with and to pay to the District Director of Internal Revenue the special tax as required by Sections 4411, 4412 and 4901 (a), Title 26, in violation of Section 7203, Title 26, United States Code. Certain pre-trial motions were filed, none of which require discussion here.

After a two-day trial which commenced on January 22, 1964, in Jacksonville, Florida, before the Honorable William A. McRae, Jr., United States District Judge, and various evidence and exhibits were introduced over appellant's objection and the testimony of six special agents together with the witnesses Eleanor Cella and Michael Liardo, your petitioner was found guilty and sentenced to one year in custody of the United States Marshal.

In a normal manner the cause came on for oral argument before the United States Court of Appeals and thereafter the opinion of the Court (Appendix A.) was entered on the 19th day of February, 1965, and that thereafter a petition for rehearing was timely filed and subsequently the Court of Appeals entered its order denying rehearing without opinion (Appendix B.).

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the writ sought by your petitioner should be granted for the reasons that the decision of the Fifth Circuit in case No. 21098, *Joseph Gartner San Fratello, v. United States of America*, which was decided on January 20, 1965, and the case of *United States v. Tucker*, 267 F. 2d 212, 3rd Cir. 1959, are in direct con-

flict with the order of the Fifth Circuit in the case at bar in denying petitioner's petition for rehearing without opinion (Appendix B., Appendix C.).

It was pointed out to the Fifth Circuit Court of Appeals that the witness Cella was placed on the stand and invoked the privilege against incriminating herself after answering numerous questions. The jury was then excused and counsel for the petitioner objected to the Government attempting to prove through the witness Cella that your petitioner rented a room from the witness, that she had given him a key, that she had been there constantly and that she knew the purpose for which he rented the room, all on the ground that such answers would incriminate her.

The Government then proffered a number of questions to which the witness Cella, exercised her Constitutional right, the questions in point being fully described in petition for rehearing attached hereto and made a part of this petition as Appendix C.

The witness was then recalled the next day and the Government indicated as follows:

> "We feel there are some questions that she has indicated she will answer.
>
> "If she persists in taking the Fifth Amendment on all questions, then it is our position that we will have to proceed with the case without her."

The Court then refused to rule on the question of her invoking the Fifth Amendment and that thereafter questions were proffered to the witness which were exactly the

same as those asked the day before on the proffer to which counsel for your petitioner claimed prejudice and asked for a mistrial. It was then that the Court stated that the witness should not be asked any questions of that type any further.

However, it is the contention of your petitioner that counsel knew by the proffer that was made the day before on certain questions that if they were asked again the Fifth Amendment would be invoked, and, therefore, it can only be concluded that the questions were asked for the purpose of prejudicing the jury against the defendant.

It is further respectfully submitted that the Fifth Circuit erred in its opinion (Appendix A.) in deciding the points more fully raised in your petitioner's brief attached hereto and made a part of the petition for writ of certiorari as Appendix D.

It is, therefore, respectfully submitted that the United States Court of Appeals for the Fifth Circuit did err in the entry of the opinion herein and in the order denying the petition for rehearing herein without opinion, and that the writ herein sought should be issued and the decision of the Fifth Circuit of the United States Court of Appeals be reversed.

Respectfully submitted,

NICHOLAS J. CAPUANO of
LURIE & CAPUANO
1409 Biscayne Building
Miami, Florida 33130
Attorneys for Petitioner

By .....

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was this 8th day of June, 1965, mailed to the SOLICITOR GENERAL, Department of Justice, Washington, D. C.

NICHOLAS J. CAPUANO

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21359

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(February 19, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM: The appellant was convicted of violating provisions of the Federal wagering tax laws. Our review of the record persuades us that no prejudicial error was committed in the trial of the case. The judgment of the district court is

AFFIRMED.

APPENDIX B.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

May 12, 1965

Re: No. 21359—Dominic J. Avallone
vs. United States of America

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

Mr. Max Lurie
Attorney at Law
Miami, Florida

Mr. William J. Hamilton, Jr.
Asst. U. S. Attorney
Jacksonville, Florida

Mr. Charles L. Marinaccio
Attorney, Dept. of Justice
Washington, D. C.

APPENDIX C.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21359

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

PETITION FOR REHEARING

MAX LURIE
1409 Biscayne Bldg.
19 W. Flagler St.
Miami, Florida
Attorney for Appellant

PETITION FOR REHEARING

The Appellant respectfully petitions this Court for rehearing of the appeal herein on the following grounds:

The Appellant respectfully suggests that the United States Court of Appeals, Fifth Circuit, erred in its judgment in that it failed to consider several aspects of the Appellant's brief in support of POINT I in arriving at its opinion, which is as follows:

> "THE COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR MISTRIAL DURING THE TESTIMONY OF THE WITNESS ELEANOR CELLA."

The Appellant would like to point out that the Court's opinion per curiam failed to take into consideration this Court's decision in case No. 21098, *Joseph Gartner San Fratello*, Appellant, v. *United States of America*, Appellee.

In the case at bar the witness, Eleanor Cella, was placed on the stand and invoked the privilege against incriminating herself after answering numerous questions. The jury was then excused and counsel for the defendant tried to defend the right of the witness to exercise her constitutional right which the Court and counsel for the Government objected to counsel for the Appellant speaking for the witness because he was not counsel for the witness. The Government, through the witness Cella, was attempting to prove that the Appellant had rented a room from the witness, that she had given him a key, that he had been there constantly, and that she knew the purpose for which he rented the room, and there is no question in counsel for Appellant's mind that answers to such questions would have incriminated her.

The Government then proferred a number of questions to the witness Cella to which she exercised her constitutional right by refusing to answer on the ground that an-

swers would incriminate her, and the following questions were asked of her at the time of the proffer:

Q. "Did you give him a key?" (T. 77)

Q. "Do you know that he had a key to the front door of your home on February 12th?" (T. 77)

Q. "Did the defendant, Dominic J. Avallone, ever live in your home on February 12, 1963, or prior thereto?" (T. 78)

Q. "Did Mr. Avallone ever go into the back bedroom?" (T. 80)

After the proffer was made, and I think at that time it was obvious to the Court that she would have the right to invoke the Fifth Amendment, but he refused to rule on the question and put the matter over until the next day.

On the next day the witness was recalled after counsel for the Appellant attempted to object to her being recalled, and stated to the Court that she had the right to take the Fifth Amendment. The Government indicated as follows, (T. 115):

"We feel there are some questions that she has indicated she will answer.

"If she persists in taking the Fifth Amendment on all questions, then it is our position that he will have to proceed with the case without her.

The Court then stated:

"Then, under those circumstances, there is no reason for me to rule at this time. I am prepared

to rule, but I am not going to rule unless the issue arises.".

Then questions were propounded to the witness and on T. 122 the following questions were asked:

Q. "Did you give the defendant, Dominic Avallone a key to your home?"

A. "I take the Fifth Amendment on that".

Q. "To your knowledge, did he have a key to your home?"

A. "I take the Fifth Amendment".

Q. "Did Dominic Avallone live in your home?"

A. "I take the Fifth Amendment".

Q. "On the occasions when he would come into your home, would he ever go into the back bedroom?"

A. "I take the Fifth Amendment".

It was after that question and another was asked that counsel for the Appellant objected, claimed prejudice and asked for a mistrial. Appellant objected on the ground that counsel for the Government knew that she would take the Fifth Amendment on certain questions from the fact that she had taken the Fifth Amendment and he knew if he asked the questions that he did ask, she would take the Fifth Amendment, which counsel claimed to the Court was highly prejudicial.

Then the Court asked:

"Mr. Lurie, do you represent the witness?"

Counsel for the Appellant then stated he was making this motion on behalf of his client, that it was highly prejudicial to his client, that he did not represent the witness and had never consulted with the witness.

Then the Court went on to say as follows on page 124:

> "That, although from the statements made yesterday it was reasonable to assume that the Fifth Amendment would be invoked, it was not reasonable to assume what the ruling of this Court would be, because I had not indicated any such ruling.
>
> "The ruling of the Court is, on the facts that have been made to appear, that she is entitled to invoke the Fifth Amendment, I think the facts are plain".

The Court then directed Government counsel not to pursue the questions that would relate this woman to this defendant in any way that might violate her rights under the Fifth Amendment. (T. 124). Not only was the ruling of the Court erroneous in the sense that he should have ruled on the first day, but it was also erroneous in the sense that the Court as well as the Government counsel knew by the proffer that was made the day before on certain questions that if they were asked again, the Fifth Amendment would be invoked, and, therefore, it can only be concluded that the questions were asked for the purpose of prejudicing this jury against the defendant. In fact, in between the first and second time Mrs. Cella took the stand, another witness was called to the stand and counsel for the Government then stated to the Court (T. 93) with reference to the witness Elardo as follows:

> "As a matter of fact, my testimony will probably

take closer to 10 minutes. It might also obviate the necessity of calling Mrs. Cella back".

Evidently counsel for the Government did not feel that he had sufficient with Mr. Elardo and attempted to coerce or force Mrs. Cella into answering questions that she did not wish to answer. In fact he deliberately asked the questions knowing that she would not answer. Counsel also argues to this Honorable Court that the trial Court in its action by failing to rule and advising the witness that she ought to consult a lawyer was in a way coercing this defendant into testifying.

The Appellant suggests that the foregoing shows an attempt by the prosecutor to prejudice this jury in the cause of trial by asking questions knowing that the said witness, Cella, would invoke the Fifth Amendment.

WHEREFORE the Appellant respectfully requests this Court to grant the Appellant's petition for rehearing in this cause.

Respectfully Submitted,

MAX LURIE
Attorney for Appellant
1409 Biscayne Bldg.
19 W. Flagler St.
Miami, Florida

STATE OF FLORIDA)
COUNTY OF DADE) ss

MAX LURIE, being first duly sworn, deposes and says: That he is of counsel for the Appellant in the above entitled cause and that he has this 10th. day of March, 1965, mailed a true copy of the foregoing Petition for Rehearing to the following: EDWARD F. BOARDMAN, United States Attorney for Appellee, Federal Bldg., Jacksonville, Florida, and he further states that this petition is presented in good faith and not for the purpose of delay.

s/ _____
MAX LURIE

Sworn to and subscribed
before me this 3rd day of
March, 1965.

s/ Gladys Hickey
Notary Public, State of Florida

My commission expires:

Notary Public, State of Florida at Large

My Commission Expires June 11, 1965

Bonded by American Surety Co. of N.Y.

(SEAL)

APPENDIX D.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21359

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

BRIEF OF APPELLANT

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STATUTES:

Constitution of the United States Fifth Amendment 3, 4

Title 26, U.S. Code, Sec. 4411 2

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Title 26, U.S. Code, Sec. 4901 (a) 2

Title 26, U.S. Code, Sec. 7203 2

TEXT:

Wharton's Criminal Evidence, Vol. 2 (12th Ed) 11

United States Court of Appeals

FIFTH CIRCUIT

No. 21359

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The is an appeal from a judgment of conviction of the United States District Court for the Middle District of Florida.

The following symbols will be used through the brief:

(T) for Transcript of Record

The case arose out of an Information filed in the Middle District of Florida, No. 63-67-CR-J, against the Appellant (T1). The information, alleging that Appellant was in the business of accepting wagers as defined by Section 4421 (1) (A), Title 26, United States Code, charged the Appellant with wilfully and knowingly fail-

ing to register with and to pay to the District Director of Internal Revenue the special tax as required by Sections 4411, 4412 and 4901 (a), Title 26, in violation of Section 7203, Title 26, United States Code. Certain pretrial motions were filed, none of which require discussion here (T2-5).

A trial of two days commenced on January 22, 1964, at Jacksonville, Florida, before the Honorable William A. McRae, Jr., United States District Judge. The government's proof pertinent to this appeal consisted of the testimony of six special agents of the Internal Revenue Service (T16, 32, 127, 146, 164, 179), Eleanor Cella (T66, 117) and Michael Elardo (T93), together with various exhibits introduced in evidence over Appellant's objection consisting of photographs (T27), telephones (T50), racing forms (T56, 58), and various paraphernalia ostensibly used in the business of bookmaking (T60, 61).

Agent Smith testified, in substance, that he was engaged in the execution of a search warrant on February 12, 1963, at 1265 N. E. 156 Street, North Miami Beach, Florida (T17). In pursuance thereof, he and four other agents were admitted to the premises by the witness Cella and upon entering the living room found the Appellant and the witness Elardo (T18). After presenting the warrant to Cella, the agents entered the left rear bedroom, discovered two telephones and the various wagering paraphernalia, which they photographed (T18-20).

Appellant was arrested by Agent Smith after the raid had been in progress for approximately twenty minutes (T28). Prior to Appellant's arrest, two additional persons entered the premises, identified as Frank Cincotta and Robert Marvo (T28, 31). Agent Mennitt, another

one of the raiding party, testified that during the course of the raid, he answered the bedroom telephones approximately 40 times (T35, 44). He was allowed to testify, over Appellant's objection, that most of the callers asked for "Joe", named a horse, a race and quoted an amount in terms of money (T36, 43, 44). He also identified the various paraphernalia as matter used in the operation of a bookmaking business.

The witness Eleanor Cella testified that she owned the premises in question and lived there with her two sons (T67). Thereafter, this witness claimed privilege under the protection of the Fifth Amendment (T68). The jury was excused, whereupon the Court heard argument of counsel and the government's proffered questioning of this witness. The witness repeatedly claimed her privilege during the proffer, (T68-84), however she did admit the installation of the telephones was made at her request (T84). At the completion of the proffer, the Court reserved its ruling regarding Cella's invocation of the privilege against self-incrimination (T93).

The testimony of Michael Elardo revealed that he was the brother of Eleanor Cella, was spending his vacation at her home at the time of the raid, that he had seen the Appellant at his sister's home on five or six occasions between February 4 and February 12, that he knew the Appellant as "Dominic", that "a couple of times" he had heard the Appellant referred to as "Joe", that he had seen the Appellant go toward the rear of the house, and that the telephones did not ring "too much" (T97-100). Elardo denied ever seeing the various exhibits in Appellant's possession, and denied ever hearing Appellant an-

swer the telephones (T108-109). He stated that he had heard his sister, Eleanor Cella call Appellant "Joe" (T109-110).

Eleanor Cella was recalled following Elardo's testimony, and after testifying that the seized telephones were registered in the names of her two sons and that the Appellant visited her occasionally, invoked the protection of the Fifth Amendment when asked if the Appellant had a key to her home, whether the Appellant lived in her home and whether or not he ever went to the rear bedroom (T122). Counsel for Appellant thereupon moved for a mistrial (T123). The Court then ruled that Cella was entitled to the protection of the Fifth Amendment and directed that further questioning along the same line would not be permitted. Thereupon, the government abandoned the interrogation of Mrs. Cella (T124-126).

Agent Bonomi testified that while assigned as an undercover agent at a North Miami Beach restaurant he observed various individuals approach two men seated at a table, known to him as "Skippy" and "Buddy"; these individuals mentioned the names of horses and races and handed "Skippy" money, whereupon "Skippy" wrote on a pad, went to a telephone, dialed the number of one of the telephones admitted in evidence, said "Joe, this is Skippy", and read from the pad (T128-129). This agent's affidavit, upon which the search warrant for the Cella premises was based, did not contain the word "Joe" (T133). Nor was the word "Joe" typed in this agent's report; it was inserted in longhand "later" (T141-143).

A key to the premises was found on Appellant's person by Agent Hilker (T148). Hilker also testified over Appellant's objection that estimating from the sheets admit-

ted in evidence, a minimum of $1,000.00 a day was being wagered (T162).

The record is devoid of any testimony placing the Appellant in the rear bedroom; nor is there any testimony placing the government's exhibits in Appellant's possession.

Appellant's motions to strike and for Judgment of Acquittal were denied (T8, 187).

On January 23, 1964, the Jury returned a verdict of guilty (T8-9) and the Court's Judgment and Commitment thereon was filed February 21, 1964 (T9-10). This appeal followed (T10).

STATEMENT OF THE QUESTIONS INVOLVED

I Whether or not the Court erred in denying Appellant's motion for mistrial during the testimony of the witness Eleanor Cella.

II Whether or not the Court erred in admitting exhibits into evidence unconnected to the Appellant.

III Whether or not the Court erred in denying Appellant's Motions to Strike and for Judgment of Acquittal.

ARGUMENT

I

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL DURING THE TESTIMONY OF THE WITNESS ELEANOR CELLA.

This section of Appellant's argument is based upon the government's propounding of questions to a witness when

there was every reason to believe that the witness would avail herself of the protection of the Fifth Amendment. Under the circumstances of this case, it is respectfully submitted that the impropriety in the questioning of Eleanor Cella deprived Appellant of a fair and impartial trial.

The witness was called, initially, on the first day of trial, and after establishing that she owned and lived in the said premises, refused to answer further questions which in any way might logically connect her to the Appellant (T68). The Court excused the jury, heard argument of counsel, and interrogated Mrs. Cella regarding her position (T69-75). The government then proffered questions to the witness, outside the jury's presence, to most of which the witness claimed her privilege (T76-90). After the proffer, the witness was temporarily excused, and the Court reserved its ruling with regard to her claim of privilege. The following colloquy occurred when the United States Attorney requested that he be allowed to call an additional witness before the Court's adojurnment for the day:

"THE COURT:

How long will that witness require?

MR. MARINACCIO:

I don't believe that witness will take more than 15 minutes. It won't take me more than 15 minutes. I can't speak for Mr. Lurie's cross-examination.

As a matter of fact, my testimony will probably take closer to 10 minutes. It might also obviate the necessity of calling Mrs. Cella back.

THE COURT:

> Well, I will have Mrs. Cella step down for the (100) moment and she will retire from the Courtroom. And you may call the next witness.
>
> My ruling with reference to the position that she has taken will be reserved at the present time." (T93)

The next witness, Michael Elardo, then gave the only testimony produced at the entire trial that the Appellant was known as "Joe" (T98). Agent Hilker's testimony that Appellant, with his back to the agent, responded to his use of the word "Joe", recalls that millions of American troops were known as "Joe" to the armed forces of Imperial Japan (T147).

The government's first witness on the following day was again Eleanor Cella. After asking the position of respective counsel, and after Appellant attempted to interpose an objection to the recalling of the witness, the Court again withheld ruling on the issue (T115-117). Again the witness was asked the incriminating questions. Again she refused to answer. It can hardly be said that the government was unaware of her probable refusal. Under the circumstances a deliberately designed plan to prejudice the Appellant was effected.

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind . . .

> Such refusals have been uniformly held not to be a permissable basis for inferring what would have been the answer, although logically they are very persuasive. How to deal with them is another matter, not easy to decide; but it is clear, not only that the presumed answer has not the sanction of an oath, but—what is even more important—that the accused cannot cross-examine. If they once do get before the jury, there arises, as we have said, a strong probability that they will be taken as evidentiary . . .
>
> *United States* v. *Maloney*, 262 F. 2d 535, 537 (2nd Cir. 1959).

The decision in the Maloney case, supra, was ostensibly based on the absence of an admonition to the jury. More logically, it would seem that the decision turned on whether or not the claimed privilege of one witness was enough to put the government on notice that subsequent witnesses would also claim the privilege. There can be no such conjecture in the case at bar. For 22 pages of testimony, the witness herself, during the government's proffer, did little else but place the United States Attorney on notice that she would "probably" refuse to answer any questions connecting her with the Appellant (T68-90).

The prohibition against the foregoing procedure has been outlined and strengthened by a long line of cases beginning with *United States* v. *Five Cases*, 179 F. 2d 519 (2nd Cir. 1950). See also *United States* v. *Amadio*, 215 F. 2d 605 (7th Cir. 1954); *United States* v. *Tucker*, 267 F. 2d 212 (3rd Cir. 1959). In the Tucker case, supra, at page 215, the court said:

> ". . . In our view a interrogating official himself gravely abuses the privilege against self incrim-

> ination when believing a truthful answer will incriminate a witness he nevertheless insists on asking the incriminating question with a view to eliciting a claim of privilege and thereby creating prejudice against the witness or *some other party concerned.* (Emphasis supplied)

The government obviously felt that Elardo's testimony would obviate the necessity of re-calling Cella. Why, then, was she re-called? It is felt that there can be only one answer—; to create prejudice against the Appellant. A mistrial should have been declared.

II

THE COURT ERRED IN ADMITTING EXHIBITS INTO EVIDENCE UNCONNECTED TO APPELLANT.

There is no dispute that the various government exhibits, relating to the alleged business of wagering, were seized at Mrs. Cella's home. There is likewise no dispute that at the time of the raid, Mrs. Cella was at home and opened the door to the raiders. Appellant and Elardo were in the living room. The contested evidence was found and seized in a rear bedroom. Beyond Appellant's physical presence in the house, there was no proof of any kind showing his connection with the seized articles.

Mrs. Cella admitted ownership to the house. The telephones were registered in the names of her sons. The record contains no testimony of any kind that Appellant ever entered the room where the articles were found. There is no testimony that the work sheets contained his handwriting, nor that the racing forms, indeed, any of the various exhibits, were owned or controlled by him.

It is submitted that the government's proof, including the key found in Appellant's possession after his arrest (T148), fell far short of the foundation necessary to render the seized articles admissible against Appellant.

Our research has failed to disclose a case where evidence has been admitted without some showing of a connective link between it and the accused. The most fundamental concepts of our system of jurisprudence demand such a connection.

Wharton states:

> ". . . Thus, the foundation for the admission of a document may be laid by proving the facts attending its execution; the signature or handwriting of the person who is purported to have signed or executed the instrument; the identification of the document by a witness who is familiar therewith; the supervision, control, and knowledge of the contents of a document by the party against whom it is sought to be used; the proper custody of a public document or ancient record; by the admission of the party against whom it is sought to introduce the writing; or by the proper certification of an official record. Without such proof, there is nothing to show *that the document is not a forgery or the act of a stranger or some other person.*" 2 Wharton's Criminal Evidence § 575 (12th Ed) (Emphasis supplied).

In *Forrester* v. *United States* 210 F. 2d 923 (5th Cir. 1954), wherein gambling paraphernalia was introduced, *there was proof* that the room in which it was found had been rented to the accused, and that the accused had been seen entering and leaving the room. Another case where *the connective* requirement *was met* is *Peden* v. *United*

States 223 F. 2d 319 (D.C. Cir. 1955). Its facts are typical of narcotics surveillance cases. Drugs were introduced which had been sold to an informer who had been searched prior to the sale and kept under constant surveillance until after the sale was consummated and the drugs were found on her person. Thus, even though the drugs were never seen in the possession of the accused, his connection to them was established to the exclusion of any other reasonable hypothesis.

The Court's remarks in *Wolcher* v. *United States* 200 F. 2d 493 (9th Cir. 1952), a tax evasion case, are illustrative of judicial thinking in excluding from evidence documentary or demonstrative exhibits for which no proper predicate has been laid:

> "The Court also admitted in evidence a paper or memorandum obtained by a government special agent from Wolcher's office files . . . The paper was wholly without foundation; there was no proof of its genuineness or who wrote it, or that it was a document made in the regular course of business, or otherwise. Its receipt over Appellant's objection was error."

Yet, the paper denied admittance in Wolcher, supra, contained the initials of the accused.

Herein, there is a complete lack of evidence showing that Appellant ever answered the telephones, that he made entries on the various paraphernalia, or that he had any connection whatsoever with any of the exhibits admitted over his objection. The admission of these exhibits, with their obvious effect upon the jury, could result in nothing but prejudicial error to the Appellant.

III

THE COURT ERRED IN DENYING APPELLAN'TS MOTIONS TO STRIKE AND FOR JUDGMENT OF ACQUITTAL.

When Appellant objected to the government's attempt to elicit telephone conversations heard by Agent Mennitt during the raid, the following colloquy took place outside the jury's presence:

> "MR. MARINACCIO:
>
> However, let me say this. With my next witness I propose to connect Mr. Avallone with these 'phones; with the next two witnesses, as a matter of fact.
>
> THE COURT:
>
> When you say "connect him", do you mean that you are going to make a proffer of testimony that the 'phones were listed in the name of this defendant?
>
> MR. MARINACCIO:
>
> No, I do not propose to show that the 'phones were listed in his name.
>
> I do propose to show to the Court and jury that this man rented that back room for $25.00 a week and that he went there every day and sat and answered those 'phones, and that they rang continually." (T41)

The Court then overruled Appellant's objection stating:

"Well, I am going to overrule the objection, subject to a Motion to Strike at a later time if the connection is not made, or any other action which counsel for the defendant may think appropriate in line with the way the evidence develops.

"But, at the present time, on the basis of the Reynolds case, I think I will overrule the objection, and I will ask that the Jury be returned, please." (T43)

Reynolds v. *United States* 225 F. 2d 123 (5th Cir. 1955), to which the learned trial judge alluded, clearly presents no basis for the ruling, since in that case the telephones were registered in the name of the accused. Furthermore, the raid was made on premises which the accused owned. No connection was ever made since Mr. Marinaccio failed to prove, as he proposed to do, that Appellant rented the back room, that he went there every day, that he answered "those 'phones" or that they rang continually. Appellant's Motion to Strike should have been granted.

With reference to the exhibits purporting to be gambling paraphernalia or memoranda, the Court likewise allowed their admission, subject to their being connected to Appellant later (T59). As with the telephones, no connection was made later. These, too, properly should have been stricken when Appellant so moved (T186). Thus without the improperly admitted evidence, there was no proof upon which the jury could have based a verdict of guilty.

"And the question is, not were they (the jury) right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken

to have upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

Kotteakos v. *United States*, 328 U.S. 750, 764, 66 S. Ct. 1239, 1247. (Sup. Ct.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Appellant is entitled to judgment of acquittal and that if judgment of acquittal is not granted, the Appellant should be given a new trial.

MAX LURIE
Attorney for Appellant
1409 Biscayne Building
Miami, Florida

STATE OF FLORIDA:
COUNTY OF DADE : ss:

MAX LURIE, being first duly sworn, deposes and says: that he has this ..... day of ....., A.D., 1964, mailed a true copy of the foregoing Appellant's Brief to the following: EDWARD F. BOARDMAN, United States District Attorney, Federal Building, Miami, Florida.

MAX LURIE

Sworn to and subscribed to before me
this 21 day of July, A.D., 1964.

Notary Public, State of Florida at Large

S/ Gladys Hickey (SEAL)

My Commission expires:

Notary Public, State of Florida at Large

My Commission Expires June 11, 1965

Bonded by American Surety Co. of N. Y.

APPENDIX E.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21359

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from May 12, 1965; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from May 12, 1965 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court deny-

ing the writ, or upon the expiration of thirty days from May 12, 1965 unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ WARREN L. JONES
United States Circuit Judge.

(ORIGINAL FILED MAY 20, 1965)

Dated:

APPENDIX F.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21359

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING
(May 12, 1965)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge

PER CURIAM

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

APPENDIX G.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21359

D. C. Docket No. 63-67-CR-J

DOMINIC J. AVALLONE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 19, 1965

Issued as Mandate:

APPENDIX H.

Constitution of the United States, Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 26, United States Code, Section 4411. Imposition of tax

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527.

Title 26, United States Code, Section 4412. Registration

(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence

of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527.

Title 26, United States Code, Section 4421 (1) (A). Definations

For purposes of this chapter—

(1) Wager.—The term "wager" means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers.

Title 26, United States Code, Section 4901 (a). Payment of tax

(a) Condition precedent to carrying on certain busi-

ness.—No person shall be engaged in or carry on any trade or business subject to the tax imposed by section 4411 (wagering), 4461 (2) (coin-operated gaming devices), 4721 (narcotic drugs), or 4751 (marihuana) until he has paid the special tax therefor.

Title 26, United States Code, Section 7203. Willful failure to file return, supply information, or pay tax

Any person required under this title to pay any estimated tax or tax, required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 237

DOMINIC J. AVALLONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 222; Pet. App. 7) is reported at 341 F. 2d 296.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1965 (R. 223; Pet. App. 37), and a petition for rehearing (R. 224-228; Pet. App. 9-14) was denied on May 12, 1965 (R. 230; Pet. App. 8). The petition for a writ of certiorari was filed on

June 9, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied a fair trial because government counsel asked questions of a prosecution witness as to which the witness claimed her privilege against self-incrimination.

STATEMENT

On January 23, 1964, following a trial by jury, petitioner was convicted in the United States District Court for the Middle District of Florida on a one-count information charging that he had willfully failed to register with the Internal Revenue Service and to pay the special occupational tax imposed by law on persons engaged in the business of accepting wagers, in violation of 26 U.S.C. 4411, 4412, 4901 (a), and 7203 (R. 1, 8-9). He was sentenced to one year's imprisonment (R. 9-10). The court of appeals affirmed (R. 222, 223; Pet. App. 7, 37).

1. The evidence adduced by the government may be summarized as follows:

At 2:30 p.m. on February 12, 1963, agents of the Internal Revenue Service knocked on the front door of a house located at 1265 Northeast 156th Street, North Miami Beach, Florida, for the purpose of executing a search warrant authorizing search of the premises (R. 16-17). A woman, later identified as Mrs. Eleanor Cella, opened the jalousies in the closed and bolted door and asked the officers what they

wanted. When informed of their identity and purpose, she appeared "stunned" and took no immediate action. When the officers again informed her that they had a search warrant for the premises, she turned toward the back of the house and "hollered something," as though speaking to someone. After some brief further delay, she admitted the officers (R. 17-18).

The agents encountered three persons in the living room: Mrs. Cella, a man later identified as Michael Elardo, and petitioner (R. 18). These were the only persons on the premises (R. 30). After tendering the search warrant to Mrs. Cella, the officers proceeded to the rear bedroom (R. 18-19). In this room were two twin beds, with a card table between them, and on each bed was a telephone (R. 19). Also on the beds and card table (in addition to the telephones) was a large quantity of horse race wagering paraphernalia—including "30 line sheets" (sheets of paper specially designed for recording bets), "scratch sheets," and "racing forms" — indicating that the room had been used for some time, and up to the moment of the agents' arrival, as the headquarters of a large-scale ($1,000 a day or more) bookmaking business, or business of accepting wagers for profit (R. 19, 34-35, 50-52, 56-61, 155-163). The enterprise had not been registered with the Internal Revenue authorities and no occupational tax stamp had been issued in connection with it (R. 182-184).

The evidence established that the person who had been operating the business was an individual known as "Joe" to his associates. During a period of ap-

proximately 60 minutes immediately following the officers' arrival, one of the agents answered some forty incoming calls on the two bedroom telephones. In nearly every instance the caller asked for "Joe" and proceeded to place a bet or bets, naming a horse, a race, and an amount of money (R. 35-36, 44-45). There was also proof that on numerous occasions between January 31 and February 10, 1963, between the hours of 11 a.m. and 1:45 p.m., a person named "Skippy" was approached by different individuals as he sat in a local restaurant. On each occasion the individual mentioned the name or number of a horse and handed "Skippy" money. "Skippy", after appearing to record the data on a pad, would periodically call the number of one of the two telephones in the rear bedroom of the raided premises, say to the person answering, "Joe, this is Skippy," and read what he had written on his pad (R. 50, 128-129).

The evidence further established that petitioner was called "Joe" and that he was the only person found on the premises by the officers who was so called. Michael Elardo—the only person on the premises at the time of the raid in addition to petitioner and Mrs. Cella—was a resident of Brooklyn, New York, and a brother of Mrs. Cella (R. 94). He had been visiting his sister, who owned and lived in the house, since February 4, 1963 (R. 28, 67, 96). He testified that he had heard his sister and one of his sister's sons (who also lived in the house) call petitioner "Joe" and that no other person known as "Joe" had been in the house, to his knowledge, during the eight days he had been there (R. 98, 100-101, 106,

109-110). Further proof that petitioner was known as "Joe" was testimony by the agent who interviewed him that, when he called petitioner by that name, petitioner, though he was seated some distance from the agent and with his back to him, stood up and turned to face the officer, who thereupon proceeded to conduct the interview (R. 147-148).

Elardo further testified that petitioner, who was shown to have had a key to the house on his personal key ring at the time of the execution of the search warrant (R. 148), had been on the premises on five or six days of the eight-day period during which the witness had been visiting (R. 96-97). Petitioner would arrive at about 11 or 11:30 a.m. and leave—on the days when Elardo was present and observed his departure—at about 4:30 or 5:30 p.m. (R. 101-102, 104). On two mornings Elardo invited petitioner to have coffee with him when he arrived. Thereafter petitioner "disappeared into the back part of the house" (R. 98-99, 111), which had no rear entrance (R. 33). Elardo "presume[d]" that petitioner went into the rear bedroom (the room with the telephones in it) on these occasions, though he "never followed him" (R. 99). The witness noticed that, after petitioner had thus disappeared, the telephones in that room, which was always kept closed, would commence periodically to ring (R. 99-100, 111-112).

2. Mrs. Cella, the owner of the premises at which the wagering paraphernalia was discovered and the person who admitted the officers, was called to testify on the opening day of the two-day trial (R. 13, 66). A week previously she had discussed the facts of the

case with the prosecutor and an Internal Revenue agent at an interview in her home, at which time the prosecutor "went through" a series of questions with her, "one by one by one" (R. 85-89). Though it appears that she answered the questions (or some of them) reluctantly, pleading that she was not feeling well, she in no instance refused to answer a question on the ground that to do so might incriminate her (R. 87-89). On the basis of information given him at the interview, the prosecutor expected to prove through her testimony (among other things) that petitioner had paid her $25 a week for the rental of the room in which the bookmaking enterprise was conducted (R. 41, 69, 89).

At the trial, the witness proceeded to answer some fifteen questions put to her by government counsel without invoking her testimonial privilege (R. 66-68). She acknowledged, among other things, that she owned the premises in question (jointly with one of her two sons) (R. 67), that she had resided there, with her sons, during the period from January 15 to February 12, 1963 (the period during which the illegal bookmaking was alleged by the information to have taken place) (R. 1, 67-68), and that she knew petitioner (R. 68). When asked if she knew whether petitioner "ha[d] a nickname," she declined to answer, for the first time, claiming her "Fifth Amendment" privilege (R. 68).

At this point, at the suggestion of government counsel, the jury was excused (R. 69), and a colloquy ensued in which the prosecutor took the position that the witness should be required to make some showing,

before she could validly claim the privilege invoked, that fear of self-incrimination was the true reason for her refusal to answer (R. 69, 72). The court inquired of the witness what "reasonable apprehension" or "ground of fear" she had in declining to answer the pending question (R. 73-74). After first reiterating that she did not "want to incriminate" herself, the witness finally told the court that she did not know petitioner's nickname (R. 74). The court observed that in that event the pending issue was "moot" (R. 75).

Still in the jury's absence, the court then asked government counsel to make a "proffer" of what additional questions (of the sort which might require the jury to "retire again") he proposed to ask the witness—in order to avoid requiring the jury to go "back and forth" (R. 75-76). Counsel, accordingly, proceeded to ask the witness a series of questions, as to most (but not all) of which she "t[ook] the Fifth Amendment" (R. 76-90).[1] The court, indi-

[1] The witness claimed her privilege as to all questions relating to petitioner and his relationship to the house—*e.g.*, how often he came to the house (R. 76-77), for how long a period he had been coming, whether he was present on February 12, 1963 (the day of the raid), whether the witness had given him a key to the house (R. 77), whether he had ever lived there (R. 78), whether he ever went into the back bedroom (R. 80), whether she had ever seen him answer the telephones in that room, whether she had ever heard the telephones ringing when he was in there (R. 83), etc. With respect to the question whether she knew there were two telephones in the back bedroom, the witness' position was inconsistent. At one point she claimed her privilege as to this question (R. 80-81); at another, she answered it in the affirm-

cating that it would defer decision, for the time being, as to the validity of the witness' claims of privilege, and possibly appoint counsel to advise her on the matter (she had indicated that she had no attorney), asked the prosecutor if he could proceed with another witness in the meantime (R. 90-92). The prosecutor replied that he could, and further informed the court that the testimony of the next witness might make it unnecessary for the government to recall Mrs. Cella (R. 93). Accordingly, the witness Elardo was called and his testimony taken and concluded (R. 93-113). The court then inquired whether the government thought it would be necessary to recall Mrs. Cella (R. 113-114). The prosecutor said he wished to "sleep on" the matter (it was then close to the time for adjournment), explaining that it "require[d] some analysis" (R. 114). The court, accordingly, indicating that it would reserve decision as to the propriety of the witness' claim of privilege until after the government had decided whether it had further need of her evidence, adjourned the proceedings till the following day (R. 114-115).

On the following morning the prosecutor advised the court that he desired to recall Mrs. Cella (R. 115). He noted that there were "some questions that she has indicated she will answer," but that if she "persists in taking the Fifth Amendment on all

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ative (R. 84). She also answered other questions pertaining to the bedroom telephones. She acknowledged, for example, that she had had them installed herself, and she explained the circumstances (R. 84-85).

questions, then it is our position that we will have to proceed with the case without her" (R. 115-116). The court directed that the witness be recalled, observing that, though he was "prepared to rule" (on the question of the propriety of the witness' claim of privilege), he was "not going to rule unless the issue arises" (R. 116).

Mrs. Cella, accordingly, resumed the stand. She repeated in substance, and to some extent elaborated upon, the replies she had given to some of the questions asked of her, out of the presence of the jury, in the previous day's proceedings (R. 117-119; see R. 84-85, and note 1, *supra*, pp. 7-8). In addition, unlike the previous day, on which she had declined to answer all questions pertaining to petitioner and his comings and goings in relation to her house (see note 1, *supra*), on this occasion she testified on these subjects (R. 119-122). Specific questions as to which she had claimed her privilege on the day before were answered by her on this occasion (R. 119-122; see R. 76-78).[2] When asked, however, whether she had ever given petitioner a key to her house, whether he lived in her house, and whether he ever went into the back bedroom, she again invoked her Fifth Amendment privilege—as she had, to those questions, on the preceding day (R. 122; see note 1, *supra*). At this point counsel for petitioner moved for a mistrial (R.

---

[2] These included, for example, whether petitioner was known to her as "Joe" (cf. R. 122 with R. 76), how frequently petitioner came to her house (cf. R. 120 with R. 76-77), whether he was there on February 12, 1963 (cf. R. 119 with R. 77), and what time he usually left (cf. R. 121 with R. 78).

123). The motion was denied, the court observing that "although from the statements made yesterday it was reasonable to assume that the Fifth Amendment would be invoked, it was not reasonable to assume what the ruling of this Court would be, because I had not indicated any such ruling" (R. 124). The court thereupon ruled, for the first time, that the privilege had been validly invoked (R. 124), and the witness was excused (R. 127).

ARGUMENT

The court's refusal to declare a mistrial was, we submit, correct. Reversible error is not invariably committed, as this Court observed in *Namet* v. *United States*, 373 U.S. 179, 186, whenever a prosecution witness, in situations like that at bar, "claims his privilege not to answer." It is only where "prosecutorial misconduct"—the "conscious and flagrant attempt [by the government] to build its case out of inferences arising from the use of the testimonial privilege"—is evident, or where (even in the absence of such misconduct) "inferences from a witness' refusal to answer" appear to have added "critical weight to the prosecution's case in a form not subject to cross-examination," that a resulting conviction will not be allowed to stand. *Id.*, at 186, 187. Neither factor was present here.

This was not a case in which government counsel consciously or flagrantly, or indeed at all, sought to build his case out of inferences arising from the use by witness Cella of her testimonial privilege. This

witness, who obviously possessed important knowledge of the relevant facts, had given no indication prior to trial that she would rely on her privilege. When, on the opening day of the trial, she invoked her privilege (in the presence of the jury) in response to a specific question, the jury was promptly excused at the suggestion of the prosecutor. An inquiry ensued, at the prosecutor's request, to determine whether fear of self-incrimination was the true motive for her plea, or whether her true objective was to shield petitioner, who obviously had had some intimate social or business relationship with the witness. When it became apparent, in the course of this inquiry, that the witness' claim of privilege had been made mistakenly (or otherwise without justification), the court was warranted in scrutinizing with some skepticism her subsequent claims of privilege (made in the proceedings out of the presence of the jury) and in deciding to reserve judgment on the issue at the close of the first day's proceedings.

Nor was the prosecutor guilty of misconduct in requesting that the witness be recalled to testify on the second day of the trial. Since it was evident from the first day's proceedings (both those in the presence and those in the absence of the jury) that the witness was willing to answer some questions and was not indiscriminately asserting privilege as to all, he could properly hope that something of value to his case might still be elicited. When thus recalled, the witness, as counsel had hoped, answered not only the questions which she had evidenced her willingness to answer in the previous day's proceedings (out of

the presence of the jury) but other questions as well, including some as to which she had claimed her privilege on the previous day. When she finally did invoke her testimonial privilege, under the circumstances we have related, the court promptly honored her claim and excused the witness.

Particularly since everything that the prosecutor did was done with the full knowledge of and by leave of the court (which was as familiar with the general situation as was the prosecutor), there is no basis, we submit, for a claim of misconduct on the prosecutor's part.

Neither is this a case in which inferences from the witness' refusal to answer added "critical weight to the prosecution's case in a form not subject to cross-examination." That an illegal bookmaking business had been conducted from the back bedroom of Mrs. Cella's residence was not substantially in dispute at the trial (see, *e.g.*, R. 200-204). The only real dispute was as to the identity of the person, called "Joe", who ran the business. Any inferences which the jury may possibly have drawn from Mrs. Cella's claims of privilege added no substantial weight to the strong evidence, from other sources, of petitioner's guilt.[3] Indeed, petitioner's trial counsel

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[3] It is to be doubted, moreover, that any inference which the jury may possibly have drawn from the witness' claim of privilege at her *second* appearance on the witness stand added significantly to the inference which, by hypothesis, the jury must also have drawn from her *first* claim of privilege (at the time of her initial appearance)—which the petition does not complain of, and as to which there was manifestly no impropriety.

argued to the jury that the witness' claim of privilege tended to indicate that she, not petitioner, was the "Joe" ("Jo") who operated the illicit enterprise in the bedroom of her home (R. 200). Cf. *Namet* v. *United States*, *supra*, 373 U.S. at 190.[4]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

AUGUST 1965.

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[4] Petitioner's only other contentions—which he adopts by reference to his brief in the court of appeals (Pet. 5; Pet. App. 27-32)—challenge the sufficiency of the proof of his guilt. We submit, however, that the government's evidence, which we have summarized in the Statement, amply supports the verdict.

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